IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONSOLIDATED MUTUAL OIL COMPANY, a Corporation, and J. M. MCLEOD,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

No. 2787

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Appellee.

No. 2788

Brief in Behalf of Appellants.

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BRIEF IN BEHALF OF APPELLANTS.

Each of these appeals is from an order appointing a Receiver.

The Government asserts in its bill of complaint in each case that the oil lands in controversy were withdrawn from location and entry by President Taft's withdrawal order of September 27, 1909; while appellants insist that the locations under which

they claim, were valid and existing locations or claims at the date of the withdrawal order and that therefore these lands were by the provisions of the withdrawal order itself excluded from the area so withdrawn.

Appellants further insist that wholly aside from the foregoing proposition their right to these locations is in any event preserved to them by the remedial statute approved June 25, 1910, commonly known as the Pickett Bill.

These two propositions will be considered in their order and we shall also discuss in its proper place the bearing of a further allegation in the bills of complaint to the effect that the locators under whom appellants claim were mere "dummies":

I.

APPELLANTS' RIGHTS AS MEASURED BY THE TAFT WITHDRAWAL ORDER.

A mining location upon the public lands confers no rights prior to actual discovery which Congress is bound to respect.

The locator may have been long in possession, going ahead in the utmost good faith in work intended to bring about a discovery; he may have been expending vast sums in the construction of permanent improvements, and his hand may be within reach of the coveted treasure; and yet Congress, if it sees fit

to exercise its powers ruthlessly, can with a word drive him from the land and confiscate his permanent improvements together with all of the benefits of his labors and expenditures.

This arbitrary power Congress can exercise, "however inequitable such a course might be."

McLemore v. *Express Oil Co.,* 168 Cal., 559.

And what Congress can do in this particular, the President also has the power to do with a mere stroke of his pen.

United States v. *Midwest Oil Co.,* 236 U. S., 459.

The question before the Court is, therefore, not what President Taft could have done with appellants' claims had he seen fit to do it. We are here concerned only with what the President did actually intend to do and actually did do with locations which were in a situation such as were appellants' claims at the date of the Taft withdrawal order.

Upon none of our claims had there been a discovery of oil or gas on September 27, 1909. If, therefore, the President's language is held by this Court to refer only to perfected claims,—that is, to claims perfected by discovery and hence already vested and valid against the government and the world,—these appellants are out of court so far as this branch of the discussion is concerned.

But such, we insist, was not the President's actual

intent, and such is not the interpretation called for by, or properly to be given to, the language he has used. The President's words are these:

> "All locations or claims existing and valid at this date may proceed to entry, etc."

What constituted an "existing and valid" claim or location at said date within the proper interpretation of these words?

This Court well knows that it has long been the law, applicable alike to claims located for metalliferous minerals and also to those located for oil, that prior to discovery the locator in possession who is duly diligent in his effort toward discovery has valuable possessory and other rights which the courts will recognize and protect against hostile intrusion by private individuals.

Crossman v. *Pendery,* 8 Fed., 693;
Rooney v. *Barnette,* 200 Fed., 700;
Hullinger v. *Big Sespe Oil Co.,* 28 Cal. App., 69;
Miller v. *Chrisman,* 140 Cal., 440.

That such possession, though accompanied by due diligence in an effort to effect discovery, gives no vested rights as against the Government, and hence affords no positive assurance that the arbitrary power of Congress or of the President will not be exercised, we have already conceded. That as a matter of proper verbiage such locations or claims could not

as against the Government be called *"perfected"* locations must also be admitted. But it is nevertheless just as true that in the accepted usage of the English language, claims initiated by location notice and in possession of a diligent claimant are properly designated and are generally known as "locations" or "claims." The language employed in the following cases will be found to afford abundant examples of this usage.

Miller v. *Chrisman,* 140 Cal., 440, 447;
Cosmos, etc. Co. v. *Gray Eagle Oil Co.,* 112 Fed., 4, 14.

Nor can it be doubted that good usage demands that some such phrase as *"perfected* claim or location" be used whenever the intention is to restrict the meaning of said words to such claims only as have been perfected by discovery.

Smith v. *Union Oil Co.,* 166 Cal., 217, 224.

A location or claim of a character so substantial that the courts will recognize and protect it, cannot, of course, properly be said to be without existence or validity.

Hullinger v. *Big Sespe Oil Co.,* 28 Cal. App., 69, 73.

We thus see that the phrase "locations or claims existing and valid at this date," which President Taft employed in the said order, is comprehensive and will

properly include a location or claim not perfected by discovery of oil at the date of the order, but which is nevertheless of such a substantial character that the courts would recognize and protect it. And we further know it to have been the law at the date of said order that the courts would recognize and protect such oil locations or claims only as were accompanied both by a *pedis possessio,* and due diligence looking to a discovery.

To us it seems very clear that as a matter of actual fact, President Taft had no thought of striking down the rights of claimants whose moral claims were very great and whose failure to perfect their claims was due wholly to the fact that Nature had not been as responsive to their efforts as she had been again and again in the cases of their neighbors, who perhaps had shown far less diligence and whose outlays had been relatively insignificant. In this connection we point to the general situation in the oil fields on September 27, 1909, which the President must have understood. It was and is commonly known that at that date there were many claims unperfected by discovery upon which the locators were actually at work and had expended large amounts of capital and physical and mental labor and energy in their quest for oil. So, too, the President must have realized the capriciousness of Nature in rewarding the efforts of a claimant in Wyoming or elsewhere who perhaps sunk his well at trifling expense to a depth of but

fifty feet, while requiring, as in the cases here in question, that the claimant must drill under difficult conditions and at enormous expense for about three-fifths of a mile before accomplishing the desired result.

The inequality in the treatment of citizens that would result if his order were so framed that it would leave one group of citizens in possession while it confiscated the outlay and labor of another whose equities were perhaps even stronger, is too obvious to have escaped the President's attention. The injustice of such inequality of treatment was so apparent that the bald excuse that the development in and prospective fruitfulness of the section which the Government had concluded to seize had especial attractions for the Governmental eye, would only have served to emphasize the ruthless denial to mining claimants of that equal protection which the mining laws, notwithstanding the arbitrary powers of the Government, were supposed to extend to all citizens alike.

These considerations lead properly to the conclusion that the President had the actual intent to extend the protection of his withdrawal order to claimants in possession who had shown due diligence in the work of discovery. It is not conceivable, we submit, that any man who ever has occupied the Presidential chair would wilfully and intentionally have been guilty of a wanton and ruthless use of his constitutional authority.

Turning to the order itself it is, as we have seen, in view of the accepted usage of the language employed, entirely proper if not necessary that the Act be construed to include unperfected claims if the same were at the time in actual possession and were being diligently worked.

But we now desire to emphasize the fact that not only is the interpretation here contended for a possible one, but that it is essential, to give the words an effective meaning—that is a meaning which would not have been already present in the order had they not been used at all.

A claim once perfected by discovery confers vested rights which no one,—much less a man of President Taft's legal learning and ability,—would for a moment suppose could be taken away either by an act of Congress or by a Presidential order.

Sullivan v. *Iron Silver Mining Co.,* 143 U. S., 434;
Manuel v. *Wolf,* 152 U. S., 505.

If confined to such claims, therefore, the saving clause in the order of September 27, 1909, would serve no useful purpose whatever.

Giving to it the meaning which we contend for, the President's order preserves the rights of a class of claimants whose legal rights against private individuals were thoroughly well established and whose

moral claims upon the Government were of a most compelling character.

This interpretation of the order has already received judicial sanction in the only case in which thus far any court has been called upon to consider the matter.

In *U. S.* v. *McCutcheon, et al.* (Equity suit A-12, Southern District of California), Judge Bledsoe rendered a carefully considered opinion wherein he gave to President Taft's phraseology an interpretation squarely in accord with our contention. Judge Bledsoe said:

> "Special pains were taken to indicate that the intention of the executive was that only *'valid'* locations or claims were to be excepted from the general operation of the withdrawal order. In order to ascertain the extent of this exception it is necessary to define what, under the law, and within the meaning and true intent of the Presidential action, constitutes a 'valid' location or claim."

After reviewing the authorities and pointing out that prior to discovery the locator has no vested right as against the Government, the learned Judge says:

> "Having, however, initiated his claim, by the posting of his notices, he is protected as against third persons, as long as he 'remains in possession and with due diligence prosecutes his claim toward a discovery.' As long as he thus conducts himself, though as against the government he has no vested rights, nevertheless, he has rights which ought to be by all parties respected.
>
> "And, in this spirit, all locators who were thus conducting themselves at the time of the making of the withdrawal order, had their rights respected by the President by the exception contained therein, and hereinabove referred to.
>
> That is to say, on the date that the withdrawal order was made, if any locator was then on withdrawn lands, in

possession, and was 'with due diligence' prosecuting his work toward a 'discovery of oil,' by the express provisions of the withdrawal order, it did not affect him. He had a 'valid' location, and he could, despite the general terms of the order, 'proceed to entry in the usual manner,' that is, proceed to a discovery and thereby perfect his right to the mineral claim. If, however, at the date of the withdrawal order such locator was not in possession, or was not with 'due diligence' prosecuting his work toward a discovery, then he had no 'valid' location, and in virtue of the efficacy of the withdrawal order as an act of a duly authorized agent of the United States government in that behalf, the order served to withdraw from further entry, location, settlement, or other disposal, the lands so claimed by such locator. . . . If discoveries of oil were made subsequent to the withdrawal order in virtue of claims initiated, however, prior thereto, and if at the time of the making of such order the locators or their successors were in occupation of the property claimed, and were at that time diligently engaged in the prosecution of the work looking to a discovery of oil therein they would be protected in their rights by the express terms of the withdrawal order itself."

U. S. v. *McCutcheon, et al.,* Equity Suit A-12.

(The foregoing excerpts from the opinion of Judge Bledsoe will be found set forth in his opinion, which is printed substantially in full as an appendix to the brief filed by the Government in this Court in Appeal No. 2660, entitled *"El Dora Oil Company, et al.* v. *United States of America."*)

We respectfully submit, for all of the foregoing considerations, that the order of September 27, 1909, preserves to the claimant who is able to make a proper showing of diligence at the date of the order, the right to go on and complete his unperfected location.

We are therefore brought to inquire what the showing of diligence must be to render the particular claims here involved "existing and valid" claims.

THE SHOWING OF DILIGENCE REQUISITE UNDER THE GENERAL RULE TO RENDER A CLAIM "EXISTING AND VALID."

The authorities already cited by us have established the proposition that to be "existing and valid," within the meaning of the President's words, a claim must have been such a one on September 27, 1909, as the courts would on said day have recognized and protected against a hostile intruder. The sole test, therefore, by which a claim will be brought within the Presidential words of exception is obviously this:

Was the claimant in possession at the date of the Taft withdrawal order? and was he exercising due diligence in the performance of work leading to a discovery?

Miller v. *Chrisman,* 140 Cal., 440, and cases cited *supra.*

The general rule as to what will constitute due diligence is thus stated in the leading case upon the subject:

> "Diligence is defined to be the 'steady application to business of any kind, constant effort to accomplish any undertaking.' The law does not require any unusual or extraordinary efforts, but only that which is usual, ordinary and reasonable. The diligence required in cases of this kind is that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs,—such assiduity in the prosecution of the enterprise as will manifest to the world a *bona fide* intention to complete it within a reasonable time. It is the doing of an act, or series of acts, with all practical expedition, with no delay, except such as may be incident to the work itself. The

law, then, required the grantors of the defendants to prosecute the work necessary to an execution of the design with all practical expedition.

". . . If it were admitted, however, that his illness constituted a valid excuse for a want of diligence, it would only excuse it whilst such illness continued, which was only for a short time in the early part of 1860. But we are inclined to believe that his illness is not a circumstance which can be taken into consideration at all. Like the pecuniary condition of a person, it is not one of those matters not incident to the enterprise, but rather to the person. The only matters in cases of this kind which can be taken into consideration are such as would affect any person who might be engaged in the same undertaking, such as the state of the weather, the difficulty of obtaining laborers, or something of that character."

Ophir Silver Mining Co. v. *Carpenter,* 4 Nev., 534.

This case has been cited with approval both by Judge Bledsoe and Judge Bean in oil cases heretofore decided by them.

U. S. v. *McCutcheon, supra.*

U. S. v. *Midway Northern Oil Co.,* 232 Fed., 619.

See, also, for further expressions declaratory of the general rule:

State v. *Superior Court* (Wash.), 126 Pac., 945, 953.

There are a number of cases in the books which indicate with clarity some specific acts which will and some which will not sufficiently evidence the diligence requisite in the case of oil lands:

Possession accompanied by active *preparation* to drill a well, although the derrick is not yet completed, is held sufficient.

Weed v. *Snook,* 144 Cal., 439.

So, too, although no work whatever has as yet actually been done upon the ground prior to the withdrawal order, it will be sufficient if the claimant and his lessee are in possession on that date and the lessee has undertaken to drill for oil and has ordered some materials, even if such materials do not arrive upon the ground until after the Presidential withdrawal order is made.

U. S. v. *Ohio Oil Co.,* No. 852, U. S. District Court, Wyoming, decision by Judge Riner.

Mere possession unaccompanied by any discovery work whatever is, of course, not sufficient.

Borgwardt v. *McKittrick Oil Co.,* 164 Cal., 651, 660.

So-called assessment work—work of the value of $100 per annum—upon the unperfected claim unaccompanied by continuous possession, is not sufficient.

Borgwardt v. *McKittrick Oil Co.,* 164 Cal., 661;
McLemore v. *Express Oil Co.,* 158 Cal., 559.

Nor is mere possession sufficient where the work is shut down solely for lack of funds, notwithstanding

the fact that the claimant has at one time been engaged in drilling a well and has made large expenditures. (At least such will be the case if it appears that the said well has never resulted in discovery and such expenditures have not contributed to an actual discovery later on.)

> *U. S.* v. *McCutcheon,* Southern District of California, Equity No. A-12, opinion by Judge Bledsoe on motion for Receiver. (This opinion will be found printed as an appendix to the brief of the Government filed in this Court in the El Dora case, Appeal No. 2660.)

In the recent case of *U. S.* v. *Midway Northern Oil Co.* 232 Fed., 619, the facts are recited in the opinion as follows:

> "No discovery of oil had been made upon any of the lands at the date of the first withdrawal order, nor was any one in possession thereof at that time actually engaged in work looking to a discovery."

It further appeared that no work had been done upon any of the numerous claims there in question at any time prior to the withdrawal order,

> ". . . except some so-called assessment work which consisted in excavating sump holes, building small cabins, and the erection of a couple of derricks on one of the tracts, which derricks were never used or equipped for drilling, but were subsequently taken down and removed to other parts of the premises" (p. 623).
>
> "Now, the evidence shows, and it is undisputed, that the defendants in none of the cases were engaged in the

> prosecution of work leading to a discovery of oil or gas at the date of the first withdrawal order, or in fact doing any work at all. Indeed, no work had been done on any of the tracts for months prior to the order, and then only so-called assessment work" (p. 625).

It was held that the foregoing facts did not bring the case within the protection of the clause of the Pickett Bill which requires that on the date of the withdrawal the claimant shall be "in diligent prosecution of work leading to discovery of oil or gas." The Court further said:

> "The mere effort, however diligent, to obtain water for drilling purposes, or the inability to do so, which is all the evidence for the defendants tends to show, cannot be held to constitute a diligent prosecution of work looking to discovery" (p. 626).

We desire to say at this point that we are not here disputing the proposition that a paper location supplemented by a *"mere* effort" to obtain water, unaccompanied by any physical labor or construction to that end, and without actual possession of the claim, will constitute due diligence. We have fully discussed this aspect of Judge Bean's decision in Appellants' Brief in Appeal No. 2789, which is to be considered by the Court contemporaneously herewith, and we respectfully refer in this connection to pages 52 to 59 inclusive of said Brief.

The foregoing rulings of the various courts as to what acts will and will not constitute proper diligence under the general law and under the Pickett Bill, are the only cases thus far decided or reported, so

far as we are advised, which tend to throw light upon the application of the general doctrine of due diligence to cases involving oil claims.

THE FACTS SHOWING THAT THE CLAIMANTS WERE EXERCISING DUE DILIGENCE ON SEPTEMBER 27, 1909.

To properly measure the acts which we claim establish a proper diligence upon the part of these claimants and their predecessor, it is necessary for the Court to bear in mind the fact that the lands in controversy are situate in an arid country; that the available water supply was very limited; that many diligent claimants anxious to proceed with work could obtain no water at all; that the two companies which had water for sale in the district could furnish but a very limited supply and had long prior to September 27, 1909, already arranged to sell water far in excess of their possible supplies (Tr., pp. 85-86, 125-128, 106-111, 116, 120).

On September 27, 1909, appellant McLeod and his lessees were in actual, exclusive possession of the whole of the section of land which embraces the two quarter sections involved in these appeals. McLeod claimed the section under four location notices. He had by *mesne* conveyances, succeeded to the rights of the locators (Tr., p. 76).

On June 25, 1909, three months before the Taft withdrawal order was made, a lease had been entered into under which the lessee on said date went into

possession. This lease, which is the same the appellant corporation is here claiming under, called for the immediate improvement of the four claims. It contemplated their development as a unit or group. The lease requires that on or before the 15th day of July, 1909, the lessee would erect a derrick suitable for drilling an oil well upon each of the four quarter sections and would within said period erect all bunkhouses necessary for the proposed drilling operations. It requires the lessee on or before August 12, 1909, to install a complete standard drilling outfit, including rig and tools, at one of the four derricks so to be erected, and that the work of drilling for oil should at once begin and be prosecuted diligently to discovery, and that drilling was to proceed upon the others as soon as the first well was completed (Tr., p. 97).

For an understanding of the activities which followed the execution of said lease we respectfully request the Court's particular attention to the affidavits of Alfred G. Wilkes and Charles H. Sherman, which cover pages 82 to 114 of the Transcript of Record in Appeal No. 2787.

Mr. Wilkes was a director of the Mays Oil Company and his testimony covers with particularity the period between June 25, 1909, the date of the lease, and the 27th day of September, 1909, when the withdrawal order was made. He also tells what was done thereafter and up to the coming of Mr. Sherman. Mr.

Sherman, who became the superintendent of the properties in October, 1909, takes up the thread where Mr. Wilkes stops, and discloses the activities of the lessee thenceforward until ten producing wells were developed on the property. The two affidavits give a very complete picture of the plans, the difficulties, the expenditures, and the actual operations of the company. The other affidavits in the Record corroborate these statements, and deal particularly with the water situation. The Government's affidavits are in entire accord with this showing and corroborate it in various particulars.

In syllabus, the essential facts disclosed by the affidavits are these:

Mays Oil Company, after securing the lease of June 25, 1909, entered at once into possession. During the period of three months and two days which intervened between such entry and the 27th day of September, 1909, when the Taft withdrawal order was made it had done work as follows:

It had built a pipe-line extending some three or four miles to connect with the main of the Stratton Water Company. It had constructed a standard derrick on each claim. In addition it had built on the northeast quarter of the section a cook-house, containing a dining-room capable of seating forty men, a kitchen and a bed-room; also a bunk-house and a water tank with pipe-line connections. On the northwest quarter it had built another bunk-house 20 by 30 feet in size.

It had established a stabling yard for its freight teams and horses and buggy on the southeast quarter, and it had built its boiler-house and other machinery for operating one full string of tools for drilling at the derrick on the southwest quarter. It had begun actual drilling on its first well during August, 1909, and by September 27, 1909, it was down about 830 feet (Tr., p. 89). And it was actually drilling with that one derrick on the said date of withdrawal.

The affidavits suggest this very important consideration, viz: This work was all done pursuant to an actual plan to drill and develop the leased properties as a unit from a single camp. To that end the derricks were grouped together about the center of the section, and the pipe-line was laid from these derricks to the only available source of water supply. The camp itself was built in such manner that each of the four quarter sections was always in actual occupation and use and in some way contributed toward the work of drilling at whichever derrick was in use.

The two-inch pipe-line was large enough to convey enough water for drilling at all four derricks, had the water been obtainable. But it was not obtainable. The water company was barely able at the outset to furnish the lessee with enough water for one string of tools. This was the case on and prior to September 27, 1909. But the water company was installing new machinery and was promising to increase the supply, and was making diligent efforts to that end. The

lessee believed these representations and expected speedily to get enough water to operate at the proposed wells simultaneously. It was then believed that thirty days might bring in a well, and in this connection it is to be noted as bearing upon the necessity for and inducement to extreme diligence on the part of the lessee, that the lessee was obligated by its lease to at least start work on the three remaining wells within thirty days after discovery of oil in the first. Apart from this obligation the lessee was very anxious, and willing and had at all times the financial ability to proceed with all of its four wells contemporaneously.

The nearest point from which it could have piped water, assuming that it could have purchased a right to the same, was forty miles away, and the cost of a pipe-line and necessary machinery was prohibitive. It was not practicable to haul the water in wagons. It was the lessee's intent, if it could get no more water, to go from derrick to derrick on said property with the supply it had, and to drill just as rapidly as the available supply would permit. The lessee, as already stated, expected on September 27, 1909, that it would be able to finish each such well in from thirty to ninety days, and even if it did not get more water, the delay was not expected in any event to be a very long one. It would certainly have taken longer than the period of time thus estimated to pipe in the water from a great distance.

(This was the situation as it appeared to the would-be diligent occupant on September 27, 1909.)

The company urged its crew to the utmost diligence. It in fact offered to its driller a large bonus in stock prior to September 27, 1909, for diligent effort, and subsequently paid it to him (Tr., pp. 92-3).

By September 27, 1909,—a period of three months and two days—the company had expended about $20,000.00 in its work upon the four claims.

The question for the Court is this:

> Do the foregoing facts evidence sufficient diligence on all four of these claims to have entitled the occupant and claimant thereof to protection against intrusion, had the intruder made his hostile entry on September 27, 1909?
>
> Or is it the law that upon the said facts the claimant who was admittedly in actual possession of all four of the claims on September 27, 1909, would have been entitled to hold against such intruder, only the one claim upon which the actual drilling was in progress when the President made his order?

The law of due diligence has never, we submit, been so narrowly and harshly applied in any case to any analogous state of facts, that a court should feel the slightest impulse or compulsion to answer the last question in the affirmative.

There are several answers to these questions which make it very clear that the showing of diligence is sufficient for each of the four claims.

The First Answer: We are concerned only with

the situation on the 27th day of September, 1909. Giving no weight to the plan for developing the property as a unit, and treating each of the two claims in controversy as a separate claim on that day, we find that the occupant had erected a derrick, established an elaborate camp, and laid a water pipe-line for several miles to connect with the mains of a water company. He also had built a water tank, and was earnestly urging the water company to furnish water through this pipe line, without which he could not begin to drill. The occupant had the financial ability to go ahead, and was anxious to proceed. The necessary machinery and tools could be installed in a few days if water was secured. These facilities and structures had been completed but a short time before September 27, 1909, and the delay in getting the water had at that date lasted over a period of only a few days and all the while the water company was promising to furnish the water and was in fact endeavoring to increase its supply to that end. The efforts of the occupant to get water had been persistent, and if there was any delay in starting up, it was purely incident to the work and was on September 27, 1909, as excusable in the law of diligence as if it had been occasioned by a temporary difficulty extending over a few days in getting labor, or fuel, or a delivery of freight supplies.

Ophir Silver Mining Co. v. *Carpenter,* 4 Nev., 535, 546-7.

The Second Answer: Drilling was actually proceeding on the adjoining claim; the water for running one string of tools was there available and at worst the water could be utilized as soon as one or two, or at most three wells, were completed, and it was then estimated that the drilling of each well would take no more than from thirty to ninety days, and about a month of this time had gone by already.

As to each of these claims, the wells on the other claims were but obstacles, as it were, which had to be overcome before getting water. It was the same as if a tunnel instead of a well must be completed—a horizontal instead of a vertical bore—before getting water into the pipe line. The claimants themselves were constructing this bore diligently, and the water supply would be ready in from one to eight months at the most.

If the obstacle were a tunnel the showing of diligence would be ample; for the following instructions were held to correctly express the law on this point in a California case:

> "6. That in determining the question of plaintiffs' diligence in the construction of their ditch, the jury have a right to take into consideration the circumstances surrounding them at the date of their alleged appropriation, such as the nature and climate of the country traversed by said ditch, together with all the difficulties of procuring labor and materials necessary in such cases.
>
> "7. The law does not require a vain or useless thing to be done; that therefore the plaintiffs were not required by the law of due diligence, to complete their

ditch before they could successfully use it for the purpose for which they dug it.

"8. If the tunnel through the ridge was a necessary part of the plaintiffs' ditch, without which it could not be used, then it was only necessary for the said plaintiffs to complete their said ditch by the time they could, with reasonable diligence, succeed in preparing their tunnel for use."

Kimball v. *Gearhart,* 12 Cal., 27, 30.

A Third Answer: The work of drilling a well then being diligently prosecuted by the same occupant a few feet away on the adjoining claim, was of a character which would tend to bring about a discovery of oil on the claim in question.

While waiting for water on September 27, 1909, the lessee, in addition to its other activities and improvements, had employed and put to work a geologist to carefully study the formation in order to guide the actual work of drilling on the property in controversy, this would certainly have been treated by a court as a proper item of work in the makeup of the occupant's showing of diligence. Now it cannot be said that the work of drilling on the adjoining claim would not give an actual knowledge of the formation far more satisfactory than any expert opinion would be. In this connection it should be borne in mind that the Government itself in the "Five Claims Act" has recognized that work on one of five oil claims "may tend to determine the oil bearing character" of the four adjoining claims.

32 *U. S. Stats. at Large,* p. 825.

And the Supreme Court of California has said:

> "Deeper drilling might discover additional strata of oil bearing sand, for example, and such discovery on one claim might satisfactorily establish their existence under all of them. If so, it would tend to determine the oil bearing character of the contiguous claims."

Smith v. *Union Oil Co.*, 166 Cal., 217, 224.

Moreover, work outside of a particular claim has always been held sufficient as assessment work if it has a legitimate tendency to aid in the development of the claim.

> "It has been so often decided that labor and improvements within the meaning of the statute are deemed to have been had on a mining claim when the labor is performed or the improvements are made for its development—that is: to facilitate the extraction of the mineral the claim may contain, though in fact such labor and improvements be at a distance from the claim—that the citation of authorities seems unnecessary. Thus it has been held that the building of roads and the like for the purpose of aiding in the development of mining property, although not within the limits of the claim itself, was a sufficient compliance with the statute requiring assessment work to be done."

United States v. *Ohio Oil Company, et al.*
(Suit No. 852, District of Wyoming).

Ours is not the case of a third person engaged in developing adjoining property. We ourselves were proceeding with a fixed plan to develop not only the adjoining property but these particular claims as well, and had our plant in substantial readiness to complete our purpose. We were, on September 27, 1909, doing work on the adjoining claim which would

demonstrate the oil-bearing character of the claims here in controversy, and guide and assist us in making our discovery when once the drilling should start up. This fact in connection with the rules laid down in the foregoing authorities, fully meets any technical objection that discovery work was not in actual progress on the date of the withdrawal "on" the claims in controversy. In short, it establishes the fact that although compelled to wait what then appeared to the lessee to be a comparatively short time before getting water and starting the wells on these two claims, said lessee was nevertheless accomplishing meanwhile and on the crucial date work which would facilitate a discovery of oil on the claims in controversy, and which was, therefore, in law discovery work.

Under the general circumstances here appearing the rule, as already pointed out, is as follows:

> "The law does not require any unusual or extraordinary efforts, but only that which is usual, ordinary and reasonable. The diligence required in cases of this kind is that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs. Such assiduity in the prosecution of the enterprise as will manifest to the world a bona fide intention to complete it within a reasonable time. It is the doing of an act, or series of acts, with all practical expedition, with no delay, except such as may be incident to the work itself."
>
> *Ophir Silver Mining Co.* v. *Carpenter*, 4 Nev., 534, 546-7.

To this may be added the following expression in

Kimball v. *Gearhart,* 12 Cal., 27, 30, to the effect that circumstances:

> ". . . such as the nature and climate of the country . . . together with all difficulties of procuring labor and materials necessary in such cases,"

may be taken into consideration.

Water is as much a "material" as is fuel, or machinery.

THE QUESTION OF FACT AS TO DUE DILIGENCE IS PRIMARILY FOR THE LAND DEPARTMENT—NOT FOR THE COURTS—AND THAT DEPARTMENT HAS PASSED UPON IT.

Upon the assumption that our interpretation of the Taft order is correct, it follows that it falls within the jurisdiction of the Land Department of the Government upon applications for patents for lands within the withdrawn area to examine into the question of due diligence in order to determine whether the particular claims were "existing and valid" at the date of the withdrawal order. The question of diligence is a question of fact which the land office has jurisdiction to pass upon.

> *Riverside Oil Co.* v. *Hitchcock,* 190 U. S., 316;
> *Cosmos* v. *Gray Eagle Oil Co.,* 190 U. S., 308;
> *United States* v. *Schurz,* 102 U. S., 396.

The record shows that appellant McLeod in 1914 duly applied for a patent covering the whole of the lands in controversy, and after due proceedings had

to that end, there was issued to him a Final Certificate of Entry (Tr., pp. 80-2).

There is no mention of this fact in the complaint. There is not in the case the slightest pretense that any fraud was practiced in placing before the Register and Receiver the evidence upon which he determined that appellant McLeod and his lessees were sufficiently diligent to have taken the land away from the operation of the Taft order or to have brought it under the protection of the Pickett Bill.

In the absence of a direct attack showing fraud in proofs of diligence, the determination of the Land Department upon this question of fact of diligence precludes any court from now inquiring into that question. That our final receipt cannot be attacked in any such manner is settled law:

> "In the present case the Brick Company's application for a patent was filed, each of the several forms of notice required by statute was given, no adverse claim was filed, the purchase price was paid to the Government, and a final receipt was issued by the local land office. The entry by the local land officer issuing the final receipt was in the nature of a judgment *in rem* (*Wight* v. *Dubois,* 21 Fed. Rep., 693), and determined that the Brick Company's original locations were valid and that everything necessary to keep them in force, including the annual assessment work, had been done. It also adjudicated that no adverse claim existed and that the Brick Company was entitled to a patent.
>
> "From that date, and until the entry was lawfully cancelled, the Brick Company was in possession under an equitable title, and to be treated as 'though the patent had been delivered to' it. *Dahl* v. *Raunheim,* 132 U. S., 262. And, when McKnight instituted possessory proceedings against the Brick Company, the latter was entitled to a judgment in its favor when it produced that final receipt

as proof that it was entitled to a patent and to the corresponding right of an owner."

El Paso Brick Co. v. *McKnight,* 233 U. S., 257.

See also:

Hamilton v. *Southern Nev., etc., Co.,* 33 Fed., 562;
Orchard v. *Alexander,* 157 U. S., 372;
Cornelius v. *Kessel,* 128 U. S., 457.

Nor could our Final Receipt, even upon direct attack, be questioned for any mere error of the Register and Receiver in deducing the conclusion from the evidence before him, that we were duly diligent on September 27, 1909. Whether or not an applicant for a patent has been duly diligent at a given date is a pure question of ultimate fact. While it is to be resolved in the light of certain accepted rules of law as to what in general will constitute diligence, it is a question of fact, nevertheless.

The Government has made no direct attack upon the Final Certificate which we presented in our showing. The Government nowhere asserts that any fraud was practiced in the evidence of diligence offered by the applicant during the proceedings in the land office. It makes no mention of the Land Office proceedings at all.

Our Final Certificate should therefore have been treated in the court below, and must be treated here, as conclusive evidence—indeed a conclusive adjudica-

tion by the proper tribunal—that here the diligence was such on September 27, 1909, that appellant McLeod was entitled to proceed to entry and patent.

Upon the evidence furnished by the Final Certificate, therefore, the full equitable title is shown to be in appellants, while the Government at most has a naked legal title. No Receiver, of course, should have been appointed on such a showing.

II.

APPELLANTS' RIGHTS UNDER THE PICKETT BILL.

If our rights are preserved by the Taft withdrawal order, it is not necessary for the Court to look to the Pickett Bill at all. Similarly if the issuance of a Final Certificate of Entry by the Land Department has the force of a judgment *in rem*—as the United States Supreme Court has declared (232 U. S., 257), we have no occasion to rely upon the Pickett Bill.

If on the other hand the issuance of a Final Certificate by the Land Department has not settled the question and our interpretation of the President's order is not followed and this Court shall hold that because our claims were not perfected on September 27, 1909, our pre-existing rights were utterly destroyed and taken away by the Taft withdrawal, then we must turn to the Pickett Bill for our relief.

SCOPE OF THE PICKETT BILL.

Assuming that the Taft withdrawal order destroyed every claim not perfected by discovery on September 27, 1909, the Pickett Bill obviously restores the rights of any claimant in the situation in which we consider ourselves to have been on the 27th day of September, 1909. The proviso of the Pickett Bill reads as follows:

> "Provided, that the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a *bona fide* occupant or claimant of oil or gas bearing lands, and who at such date is in diligent prosecution of work leading to discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work."

That this Act was at least applicable to claims where the possession and discovery work were such that the courts would have protected the occupant against intruders, the learned Attorney General himself concedes. In his letter to the Secretary of the Interior, dated April 26, 1916, referring to locators upon the oil lands whose claims were not affected by discovery, he says:

> "These persons (i. e., locators) under the existing law were entitled to enter upon the public lands, to survey and mark the portions desired, to explore for oil and gas, and upon discovery to take title ultimately by patent. So long as they were diligently and in good faith engaged in prosecuting the work of discovery they were entitled to possession and to protection against clandestine and hostile entry by others. *Miller* v. *Chrisman* (140 Cal., 440; 197 U. S., 313); *McLemore* v. *Express Oil Co.* (158 Cal., 559); *Borgwardt* v. *McKittrick* (164 Cal., 650).

> "The proviso to the Pickett Act protected this explorer's right from the order of withdrawal to the same extent and upon the same conditions as it was protected by pre-existing law aganst private intruders."

There is, therefore, upon this point no dispute between the Government and ourselves as to the general proposition that any claim accompanied by possession and what would be considered due diligence under the pre-existing law is restored and revivified by the foregoing provision of the Pickett Bill.

It should be noticed that if killed by the withdrawal order, such a claim remained dead for upwards of eight months and until revivified and resurrected by the Pickett Bill of June 25, 1910.

We have seen that in the learned Attorney General's view as above expressed, the same showing of diligence that would have saved our claims under the interpretation placed by us upon the Taft order will be sufficient also to save it under the Pickett Bill. The rule, therefore, by which a showing of sufficient diligence may be determined is, Was the showing of diligence such that the courts would have protected the occupant on September 27, 1909, against a hostile intrusion?

All that we have set forth, therefore, *supra,* on pages 1 to 27 inclusive, is applicable to this proposition, and we respectfully request the Court to consider the same as incorporated hereunder.

If under the circumstances of our case this Court

shall hold that any delay in having started actual drilling upon these claims prior to September 27, 1909, was excused under the general law of due diligence pending our continued efforts to get a sufficient supply of water through our already-constructed pipeline, we have no occasion to go further in our consideration of the relief afforded to us by the Pickett Bill.

So, too, if the Court shall hold that the drilling which we were actually engaged in at the date of the order upon the adjoining claim was discovery work within the fair intendment of the pre-existing law of due diligence, there is no occasion to look further into the meaning of the Pickett Bill.

But if this Court does not accept our views on the preceding proposition, then it becomes important that we point out that a much more liberal rule as to the diligence requisite was incorporated into the phraseology of Congress than is to be found in the general law if it is thus interpreted by the Court.

LIBERAL CONSTRUCTION OF "WORK LEADING TO DISCOVERY."

That this remedial statute was intended to and does greatly enlarge the class of claims which were unaffected by the withdrawal order cannot be doubted. That order as interpreted by us exacted both actual possession and diligent discovery work. The act of Congress, on the other hand, does not require that

the claimant should have been in physical possession. We do not understand that the learned Attorney General disputes this proposition.

But the principal point which interests us is this: If it be that under pre-existing law our actual drilling work on one quarter section cannot be treated as evidence of diligence to make a discovery on the other three adjoining claims, then the Act at once comes to our rescue; for the phrase "in diligent prosecution of work leading to discovery of oil or gas" is a phrase which was intended by Congress to embrace actual drilling upon one claim in what may be termed a unit or group development.

The history of the Pickett Bill is to be found in official governmental publications (See "Hearings held before the Committee on the Public Lands, of the House of Representatives," May 13th and 17th, 1910, H. R. 24070).

As originally framed the bill ratified the Taft withdrawal order of September 27, 1909, in express terms. A delegation of oil men, all of whose claims had been initiated prior to the Taft withdrawal order (above pamphlet, page 17) went before the House and Senate Committees on Public Lands, in May, 1910, and stated their grievances. The result was that the bill as finally recast contained the proviso above quoted. It is not open to doubt that it was designed for the express purpose of protecting a certain class of unperfected locations which, it was believed or feared—

whether rightly or wrongly is not important—the Taft withdrawal order did not protect at all.

Judge Bledsoe's decision, in the Obispo Oil case above quoted, had not then been rendered, and by many oil men it was feared that all oil lands not covered by perfected claims had been withdrawn by the order, no matter how much actual work had been done thereon, if no discovery had been made at the date of the withdrawal.

But that was not all. Even, as since interpreted by Judge Bledsoe in the Obispo Oil case, the exception contained in the Taft order required actual *pedis possessio* of the claim, accompanied by "due diligence" toward its actual development. Even as so interpreted, the exception did not meet the situation in which a great many oil men found themselves, for many companies had bought or leased groups of claims—wholly unprotected by actual discovery,—with the intention of developing them as a single group or property. There were many cases in which vast outlays had been made on such a group, all tending to determine the oil-bearing character of a new field, and yet there was no actual *pedis possessio* of or improvements upon one or more unperfected locations in the group. In some instances—but by no means in all—the preliminary steps had reached the point where one or more wells were actually being drilled on some one of the group of unperfected locations. The other unperfected claims in the group might adjoin the

claim on which the drilling was going on, or they might be a mile or more away, and yet the one well, should it strike oil, would determine—or at least tend strongly to determine—the oil-bearing character of the whole group of claims. In any event, such a well would afford a knowledge of the formation and aid as a guide in future development work upon the several as yet untouched claims, and also perhaps furnish a supply of fuel or additional water for future contemporaneous drilling.

In the remote, fenceless, desert districts which comprise the oil fields, there would, in many cases, be no actual physical possession of any part of the company's surrounding on adjoining claims, save at the one well where drilling operations were under way. And again, perhaps there would be no drilling at all actually under way anywhere in the group, as in cases where there were large preliminary outlays for roads, pipe lines, and undelivered lumber and machinery.

It has always been a recognized fact that work on one oil well may tend to determine the oil-bearing character of the surrounding locations. Congress, we have seen, itself recognized this fact in the Five Claims Act, 32 Statutes, 825. And, as already pointed out, the Supreme Court of California has taken judicial notice of the fact that deep drilling on one of a group of claims, "would tend to determine the oil-bearing character of the contiguous claims, although wholly

unnecessary to perfect the locations" (*Smith* v. *Union Oil Co.*, 166 Cal., 217, 224).

With these considerations in mind it is our purpose to point out that Congress intended that if a well or other development work intended as a part of a group development, was actually in progress in good faith upon one of the group on September 27, 1909, this sufficiently fulfills for the whole group the "diligent prosecution of work" called for by the Act.

The following excerpts from the proceedings before the House Committee on Public Lands during the consideration of said bill make the situation which Congress sought to remedy very clear:

> "MR. O'DONNELL—This El Cerito well is a fair illustration of the 'wildcatting' in this territory. It was drilled to a depth of over 4,000 feet and was unsuccessful. Is there anybody here that knows the exact amount expended on that well?
>
> "A GENTLEMAN—$110,000.
>
> "MR. O'DONNELL—I will say, anyhow, that it was over $100,000.
>
> "THE CHAIRMAN—Has a discovery been made on that particular tract up to this time?
>
> "MR. O'DONNELL—No; there has not. They have been working there for nearly four years, I believe.
>
> "THE CHAIRMAN—And therefore the people who have expended $110,000 at that point have not clinched their claim legally by making a discovery?
>
> "MR. O'DONNELL—If you go to the Land Office today, they will report that it is vacant.
>
> "THE CHAIRMAN—Oh, yes, certainly; they will do that as to all of them. . . .
>
> "MR. VOLSTEAD—But, as a matter of fact, they have not yet made a discovery?
>
> "MR. O'DONNELL—They have not yet made a discovery.
>
> "MR. VOLSTEAD—Do you mean to say that no discovery has been made in that field at all?

"MR. O'DONNELL—No; not yet. The development through there is very expensive. It may not be oil territory. These people may be wasting their two or three millions of dollars that will have been expended there anyhow. But they are doing it; and in case of the withdrawal, if it should be oil land, it would not be theirs after they got it.

"THE CHAIRMAN—But the importance of that is this: Here is one tract of 160 acres upon which $110,000 has been expended, where no legal right has been acquired, assuming that a legal right is only acquired when a discovery of oil is made.

"MR. O'DONNELL—Yes; that is right.

"THE CHAIRMAN—And therefore, in case of a withdrawal, that did not recognize the claim of those who had made that expenditure, they might lose all of their expenditure in that particular tract, and all claim to it?

"MR. O'DONNELL—That is the idea.

"MR. LACEY—They are still going on. Notwithstanding the withdrawal, they are still going ahead.

"MR. O'DONNELL—**They are abandoning that well now, and moving to another location higher in the formation. They got their information there, though, at this cost; and that is the way the development proceeds.** It is not all successful.

"THE CHAIRMAN—Now, they have gone on to another claim?

"MR. O'DONNELL—Yes; that is my understanding.

"THE CHAIRMAN—That claim was located prior to the withdrawal?

"MR. O'DONNELL—Yes.

"THE CHAIRMAN—But of course no discovery was made on it prior to the withdrawal?

"MR. O'DONNELL—No.

"THE CHAIRMAN—**And they now seek to obtain some benefit from their $110,000 expenditure at a point where it was valueless by going upon another claim, located prior to the withdrawal, and making a discovery there?**

"MR. O'DONNELL—That is the idea exactly. . . ."

Hearings, Public Lands Committee, May 13 and 17, 1910, on H. R. 24070, p. 3.

Mr. Orcutt was another operator.

"THE CHAIRMAN—You are drilling upon a *tract* that was filed upon before withdrawal?

"MR. ORCUTT—Yes, sir.

"THE CHAIRMAN—Upon which discovery had not been made prior to the withdrawal?

"MR. O'DONNELL—It is not made yet.

"MR. ORCUTT—It is not made yet. We have spent thousands and thousands of dollars there trying to make a discovery.

"THE CHAIRMAN—Were you on *that particular tract,* drilling, at the time of the withdrawal?

"MR. ORCUTT—*We were on some of it.* We had the tools on some of it at the time of the withdrawal.

"THE CHAIRMAN—*But you had it all located* with a view to future development?

"MR. ORCUTT—We had *it all* located prior to the withdrawal."

ibid, pp. 21, 22.

Many other similar passages to those above set forth might be quoted. The foregoing, however, sufficiently illustrate the point that one of the objects and purposes of the proviso was to meet the situation thereby declared and to protect these groups of claims in proper cases; and to that end to provide that active development work—such as drilling that $110,000 well—progressing in good faith at the date of the withdrawal at one of a group of claims and having a tendency to effect or facilitate the discovery of oil on the rest of the group, should be deemed sufficient to preserve the rights of the claimant to the entire tract.

The precise language of the proviso is itself convincing. The Act protects the "claimant of oil or

"gas-bearing lands . . . who at such date is in "diligent prosecution of work leading to discovery "of oil or gas." It makes no reference whatever to a "location." The phraseology includes a tract of land made up of a group of claims—"oil-bearing lands"; that is all. And the "work leading to discovery" nowhere bears reference to any location, but is referable to the whole tract of oil-bearing lands so claimed. It does not say that the work of discovery must be upon or referable to a single location. He must be a *bona fide* claimant, and this cannot be unless he manifests by his acts and conduct that he has a *bona fide* intent to discover oil upon the tract which he claims. Any work in diligent progress having a fair tendency to that end will satisfy the Act, and such work may be either on or off the tract.

One successful well, as we have seen, would be a practical demonstration that further wells would be justifiable within the tract. It would determine the formation and lead to discoveries elsewhere on the group. So, too, such well might supply water or fuel for further drilling in the tract. In this way discovery on all of the claims in the group claimed would be facilitated. The sinking of the one well, in other words, is "work leading to discovery of oil or gas" on every claim within the group.

No one can read from end to end the proceedings from which we have quoted and not be convinced that

Congress intended work of that character to be sufficient.

The Land Department in a very important and carefully considered case has adopted the general view of the meaning of the Pickett Bill which we are here pressing upon the Court. The learned Commissioner of the General Land Office (Mr. Tallman) had before him the following facts among others:

The Honolulu Consolidated Oil Company asked patents for a group of seventeen claims—each covering a quarter section—all of which were not contiguous, but none of which was more than three miles from a certain Section 10—patented land upon which the company contemplated its central station should be located for the development of the field.

Upon thirteen of these quarter sections, cabins had been erected in January or February of 1909.

On four of them no cabins had been erected.

On four of the claims on which cabins had been erected, skeleton derricks had been constructed prior to March 1, 1909.

On seven of them skeleton derricks had been erected prior to August 1, 1909.

On six of them no derricks at all had been erected prior to the Taft withdrawal of September 27, 1909.

On the four claims upon which no cabins were built, skeleton derricks were erected as early as February, 1909, but *these derricks appear to have been*

the only improvements of any kind upon the said four claims at any time prior to the year 1910.

Actual drilling did not begin on any one of the whole seventeen claims prior to February 14, 1910. Drilling upon one of them did not begin until March 3, 1911.

Groups of camp buildings were established on some of the sections of land before the date of the Taft withdrawal order. On others there were none.

Buena Vista Lake, from which water was obtained, was only 13,000 feet (about two and one-half miles) distant from said Section 10. Two pipe lines, each two inches in diameter,—both of which proved utterly inadequate on account of the friction in pumping to the elevation,—had been constructed from the lake as far as said Section 10 by May 3, 1909.

It did not appear that any distributing pipe lines connecting with the central reservoir on Section 10 were constructed prior to the Taft withdrawal order.

The roads constructed for this development work had all been completed prior to September 1, 1909.

The cabins on thirteen of the claims appear to have been occupied. There appears to have been no *pedis possessio* whatever on four claims at the time of the Taft withdrawal order, and no improvements, beyond the fact that of the four claims there was the skeleton derrick above referred to, together with a road leading therefrom.

It appears that after drilling first started and be-

tween February 14, 1910, and April 16, 1910, the company, with its then water supply, had been able to start work on but three wells—the first on February 14th; the second on March 1st, and the third on March 29th—all in 1910. A four-inch main between Section 10 and the lake and a pumping plant was completed by April 16, 1910, and on May 17, 1910, the company began drilling its fourth well. Wells upon the remaining claims were started between June 13, 1910, and March 3, 1911.

There, as here, the evidence clearly indicated the intention of the oil company to develop the entire group of claims.

In the course of his elaborate opinion—wherein he allows the application—Commissioner Tallman says:

> "From the foregoing it is observed that actual drilling did not commence on any one of these claims until after withdrawal of the land on September 27, 1909, and that periods of several months elapsed with no work leading to the discovery of oil or gas being done or improvements made within the boundaries of some of them. It is quite clear that each of these applications must fail if considered alone without allowance of credit for any of the general preliminary work and common improvements begun prior to the withdrawal and claimed to have been so designed and prosecuted as to except the claims involved from its force and effect. A considerable part of this general work and many of the improvements used in the scheme of common development were placed on lands not covered by the claims,—lands that had been previously patented. The following questions then arise:
>
> "1. Is preliminary work performed outside the boundaries of a claim (such as building roads and pipe lines, the installation of machinery, etc.) under any circumstances 'work leading to the discovery of oil or gas' within the meaning of the proviso to the act of June 25, 1910?
>
> "2. May such work and improvements be in the nature

of a common improvement for the benefit of several claims?

"Just what is admissible as work leading to the discovery of oil or gas within the meaning of this act, is an open question and one on which there has been a wide divergence of opinion. It has been contended, though not in this case, that efforts looking to the financing of a scheme to develop an oil property should be placed in this category, while on the other hand, the other extreme has been advanced that nothing short of actual drilling on the land should be admitted. After a careful consideration of this question, I am of the opinion that, in proper cases, work and development relating to the land itself and the installation of equipment necessary to its physical development looking to oil or gas production, may be classed as work leading to discovery. If when viewed from a practical business standpoint and in accordance with good, approved practice, the preliminary work of building and maintaining good roads, the development of water and fuel system, the installation of machinery and the construction and equipping of camps are necessary to the work of discovery or essential as an economic business proposition, then in my judgment such work and improvements may properly be recognized as work leading to discovery within the meaning and contemplation of the act, *provided*, it is clearly apparent from all the facts that such work and development are designed and intended to develop the particular claim in question.

"Furthermore, I am unable to see any good and sufficient reason why such work and improvements not within the boundaries of a particular claim may not in proper cases and within certain limitations, be equally considered as work leading to discovery where such work and improvements are designed and adapted for a unit development of several claims under a common and connected system. Therefore, I am of the opinion that 'work leading to the discovery of oil or gas,' may consist of labor and improvements actually performed and used in the common development of several mining claims, provided it is clearly shown that there exists a common ownership, that the work is of such a character as to be clearly adapted to and intended for a unit development, that the inclusion of each particular claim composing such unit is clearly apparent from the physical facts on the ground, and that the nature of the common development is consistent, and its extent commensurate, with the character

and area of the group of claims proposed to be developed as a unit.

"These questions having been answered in the affirmative, the third question arises.

"3. What shall be the extent and continuity of operations to constitute diligence within the meaning of the act and the decisions of the Department and the courts generally?

"As a general proposition what constitutes diligence must depend upon the facts in each particular case. Manifestly, in an enterprise beset with many unknown conditions, due regard must be given to those unavoidable delays which arise out of the contingencies of the development work itself, provided due diligence is found to exist in meeting new conditions as they arise, and all the facts of the situation indicate that the element of good faith is at all times apparent.

"If it be satisfactorily shown that the applicant's efforts have been applied in the manner accepted generally as in accordance with good business practice after all the conditions have been considered, one act following another in logical and orderly sequence, as dictated by experience and reasonable judgment, with the object of reaching and discovering the oil or gas measures lying within his claim, or group of claims, I believe he should be credited with due diligence and with having met the requirements of the act in this respect, provided at the date of the withdrawal, and continuously thereafter to discovery on each particular claim, either (a) such common development and improvement leading to discovery as may be properly and directly credited in part to each particular claim, pursuant to the principles above discussed, or (b) development and improvement work leading to discovery on the particular claim itself, are continued diligently and without interruption, on a scale commensurate with the extent of the unit development contemplated and in accordance with good economic practice, the required continuity of such common or particular development and improvement to be ascertained from the work and improvements actually done and made on the ground. It does not follow from the above, however, that a mere progressive development of a series of claims one after another where the claims of the series last developed are not directly and necessarily dependent on the prior development of other claims in the group, would constitute diligence within the meaning of

the act so as to offset the effect of an intervening withdrawal."

See opinion in

Honolulu Consolidated Oil Co. (December 15, 1915; Visalia 03495).

In order that the Court may be fully informed as to the status of the foregoing application, it should be said that on April 12, 1916, the Department of Justice requested the Honorable Secretary of the Interior not to issue patents on the Commissioner's opinion pending the judicial determination of pending suits (of which this is one). While expressing no disagreement whatever with the views of Commissioner Tallman, the Honorable Secretary of the Interior has, in deference to this request, withheld thus far the issuance of such patents.

In this connection the attitude of the learned Attorney General toward the said Honolulu decision is interesting. In his letter to the Secretary of the Interior, wherein he requests that patents be not issued to the Honolulu Consolidated Oil Company pending an interpretation of the Pickett Bill by the courts, he says:

"April 16, 1916.

"Hon. Franklin K. Lane,
Secretary of the Interior.

"Dear Sir: In accordance with previous correspondence between us, I now submit to you a statement of the conclusions reached by this department with regard to the above-mentioned opinion. Some of the principal questions

of law presented are involved in pending litigation and some of them have already been argued and submitted on behalf of the Government. Until the courts have acted it will be seemly and in every way desirable for executive officials to hold their own views in suspense so far as possible. You will understand me, therefore, as not intending to be dogmatic in what follows, but as simply expressing the views which, with the light now available, are at present entertained. These may be summarized as follows:

* * * * * * *

"3. All work 'leading to discovery' need not be performed on the identical tract in view and upon which discovery must ultimately be made to permit a location. Indeed, in the search for oil and gas, extraterritorial work, such as road making, pipe laying, etc., is frequently, if not customarily, indispensable. But of course such extraterritorial work, to be availing, must be necessary in character and clearly related to the tract in question. To avoid abuses the character, scope, and necessity of such work should be closely scrutinized. The bona fides of the explorer would, of course, be weighed in the light of the contemporaneous presence or absence of open and notorious acts of possession upon the tract itself.

"4. It may be that under exceptional circumstances two or more contiguous tracts may constitute what, in the commissioner's opinion, is styled a 'unit development,' and as such may share the benefits of preliminary work 'leading to discovery,' which is not performed upon either of them. The difficulty with this doctrine lies in stating and limiting it so that it may be harmonized with the fundamental purposes of the mining law to preserve free and open competition and to prevent claimants from monopolizing more land than they are actually engaged in exploring."

Up to this point, it will be observed that there is no apparent conflict between the views of the Attorney General regarding the Pickett Bill and those which we ourselves have advanced. But the learned Attorney General then goes on in his letter and apparently interprets the opinion of Commissioner Tallman as indicating that if the work performed on an entire

group is no more than that ordinarily required of the claimant of a single location, it will nevertheless be enough to hold the entire group; and the learned Attorney General proceeds to express his convictions to the contrary.

We do not think that Commissioner Tallman so held or that he intended to be so understood. At any rate, we ourselves are not called upon by the facts in our case to go so far. We are not here concerned with what our rights might be if there were a showing that the improvements actually upon our group of claims and our water pipe line leading to them bore no relation to the unit development called for by our lease. If they were adequate to the development of only one claim at a time, the question might be very different. But it is enough that such is not the actual fact.

The lease under which our development work was done required the simultaneous drilling of several wells. At least one on each claim in the entire group was to be started within thirty days after the first discovery (Tr., p. 97), and the lease also called for further simultaneous development. The water pipe line was built for the purpose of supplying enough water for simultaneous work on all four of the claims, and its capacity (two-inch) was sufficient for the purpose. The lessee did not merely erect a derrick on one claim and install a single rig—but built a derrick on each claim at a convenient place to work all four of

them simultaneously from the one central camp. The camp itself was not a "one-derrick camp." It was purposely built to accommodate forty men in anticipation of simultaneous drilling on the entire group of claims (Tr., p. 91). So that here we have a clear case where the improvements erected had immediate reference to developing the whole property as a group. It was "necessary in character," was "clearly related to the tract in question" and responds most satisfactorily to the close scrutiny suggested by the learned Attorney General under paragraph 3 of the foregoing letter.

But there are certain further expressions in the said letter of the learned Attorney General to the Secretary of the Interior with which we do not agree and the repetition of which here will serve, we think, to emphasize the difference in point of view which probably lies at the foundation of this litigation.

He says:

> "The situation must be looked at, of course, from a point of view entirely different from that which would prevail if the tracts were already under a common, private ownership. In that event, sound business judgment might dictate that preliminary operations should be confined to some one tract, and that expenditures upon the remaining tracts should be deferred to await results. Failure to obtain oil at the place selected for the first drilling might dictate the abandonment of the entire enterprise. Success there might not only demonstrate the value of the remaining lands, but might furnish fuel for subsequent operations. So a single water pipe, of moderate dimensions, extended in succession to one tract after another, might suffice for drilling on the tracts in sequence; whereas a much larger and more expensive pipe line, with branches, or a number of such lines would be required to conduct drilling on all of

> the tracts contemporaneously. But however wise such methods would be from an economic standpoint on the part of an absolute owner, I am unable to persuade myself that such foresight and economy can be taken as a substitute for the diligence required under the mining law as to each tract sought to be held. I do not think that under that law a tract may be held tentatively to await exploratory work conducted upon another which does not tend directly to exploration upon the former. A search for fuel or water on one tract, for use if found in exploring another, is not work done in exploration of that other; and this is all the more true if the search is conducted entirely outside of any of the tracts sought to be grouped as a unit."

Some of the foregoing expressions seem to be in sharp conflict with the general rules defining what comes within the purview of proper diligence. For convenience we here again repeat the words of Judge Hawley which are expressive of the universally accepted doctrine:

> "The law does not require any unusual or extraordinary efforts, but only that which is usual, ordinary and reasonable. **The diligence required in cases of this kind is that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs.** Such assiduity in the prosecution of the enterprise **as will manifest to the world a bona fide intention to complete it within a reasonable time.** It is the doing of an act, or series of acts, with all *practical* expedition, with no delay, except such as may be incident to the work itself."
>
> *Ophir Silver Mining Co.* v. *Carpenter,* 4 Nev., 535, 536-7.

This, we submit, is a far sounder doctrine than that which certain expressions in the passage quoted above from the letter of the learned Attorney General seems to express.

If "the assiduity in the prosecution of the work" manifests to the world a *bona fide* intention to complete it within a reasonable time, and if the diligence is of a character usual with men engaged in like enterprises upon their patented land who desire a speedy accomplishment of their designs, it satisfies Judge Hawley's appreciation of the law.

What useful purpose, we may well ask, would be served by following out the learned Attorney General's view? If the good faith of the plan for group development sufficiently appears, and the claimant has ample means—and their sufficiency is of course an element in his good faith—why should Congress ever have felt it necessary to exact of him an economic waste of his capital?

Practical business methods certainly would have no tendency to discourage development. In an untried field, such as ours was, no one knew how deep he would have to go. A sensible man would be much more likely to go on with drilling to a depth of three thousand feet and thus demonstrate his group if he were called upon to drill one well, than if he were forced to drill four wells at a time. Is it not more likely that one who had undertaken four wells would get discouraged and abandon all four of them at, say, one thousand feet and thus make no discovery at all? If, therefore, the underlying policy is the encouragement of actual discovery, the latter would certainly be fostered, rather than retarded by the economies which

the owner of a patented tract would be wise in observing.

It is not conceivable, in view of the remedial character of the proviso in question, that Congress ever intended that the Bill should exact from the oil men a higher degree of diligence in their group operations than that which—paraphrasing Judge Hawley's words—was usual with men possessed of sufficient capital and bent upon exploring for oil, a tract of patented land larger than any single mining claim in area, which land they believed to be oil bearing, and where in good faith they had the desire to demonstrate this fact and develop the property speedily. Such a group of men, however wealthy, would not be likely to go to wasteful and absurd extravagances in rushing their work. They would not, for instance, rush to begin the building of a half-million-dollar pipe line in order to get water with which to drill upon three extra claims a few feet away on the same section of land when they believed themselves able to get water elsewhere at a trifling cost within a few months and probably sooner than they could complete such a pipe line.

JUDGE RINER FORTIFIES COMMISSIONER TALLMAN'S VIEW OF THE PICKETT BILL.

The United States District Court of the District of Wyoming has handed down an opinion in one of the suits brought by the Government which is far more liberal on its facts than is the decision of Commissioner

Tallman in the said Honolulu Consolidated oil case.

The lands involved were embraced in a withdrawal order dated May 6, 1914. They had been located early in the same year and consisted of two claims covering a tract of 240 acres. In April, 1914, representatives of the locators and of defendant company together "examined the lands." In the last part of April, 1914, defendant corporation took an oral agreement to lease the claims as a whole (or group) and agreed thereby to proceed with the drilling of wells. The defendant company "at once" employed one Virgil Jackson and "left him in charge of the claims." This, it will be noted, was in the last part of April. On May 4, 1914—two days before the withdrawal order there in question was made —the defendant corporation directed that certain materials owned by it and stored at Caspar be loaded on the cars for shipment to Kirby, the nearest railroad point. On the same day lumber was ordered to be delivered on the lands and "a carpenter was employed to construct certain necessary buildings." On May 5th a contract was entered into with a man to drill wells on the claim in controversy. Pursuant to this oral contract of lease the Court finds that the defendant had "expended and obligated" itself for materials necessary to the work of drilling wells on the two claims in controversy, in the sum of $2,000.00 or more. This was one day before the order was made. It would seem that on May 6, 1914, a temporary camp had been established on the property. The proceedings

had arrived at the stage we have indicated when the withdrawal order became effective. Not until May 7th—one day after the withdrawal order was made—did any of the materials previously ordered arrive, and not until then was the construction of anything—not even a permanent camp—begun. Upon the foregoing facts Judge Riner held:

> "That the defendants were bona fide occupants and claimants of the oil-bearing lands in controversy and were engaged in the diligent prosecution of the work leading to the discovery of oil in commercial quantities on said lands at the date of the withdrawal order made by the President, to wit: the 6th day of May, 1914."
>
> *United States* v. *The Ohio Oil Company, et al.*, opinion filed in Suit No. 852 (District of Wyoming), not reported as yet.

The efforts and acts toward the development of the claims in the foregoing case are obviously far outweighed as evidencing both good faith and diligence by the showing made in the case at bar.

THE LAND DEPARTMENT HAS ISSUED ITS FINAL CERTIFICATE OF ENTRY FOR THESE LANDS, AND INQUIRY INTO ANY QUESTION INVOLVING DILIGENCE IS NOW FORECLOSED.

What we have said on this same subject regarding the withdrawal order, applies with *like* force to the question of the sufficiency of a given state of facts to establish the "diligent prosecution of work" required by the Act of Congress.

The Land Office has jurisdiction of such a question. Upon due proceedings had the Register and Receiver has concluded that our showing of diligence entitles us to patents for the claims in controversy and he has taken our money and has issued to us his final receipt.

El Paso Brick Co. v. *McKnight,* 233 U. S., 250, 257;
United States v. *Schurz,* 102 U. S., 378, 396.

This Receiver's receipt has the force of a judgment *in rem* binding upon the Government, and cannot be set aside by the courts any more than could a patent in any collateral proceeding.

United States v. *McKnight,* 233 U. S., 257.

This is not a direct attack. No fraud in our proofs of diligence is here claimed. No mention is made in the bill of our receipt or of these proceedings in the Land Office. Our title cannot now and in this manner be disputed. The Government, therefore, has no case upon the merits.

III.

"DUMMY LOCATORS."

This matter may be summarily dismissed:

The allegation is made that the location notices under which appellant's claim were posted by "mere dummies" to enable "defendant McLeod or some one

else" to secure patents (Tr., p. 11). The verification of the Bill is made by one Dyer, a Special Agent of the Land Office, who expressly disclaims any personal knowledge, but asserts that he has examined records and affidavits, and from these "is informed as to the matters and things stated in the complaint and after investigation believes them to be true" (Tr. No. 2787, pp. 16-17).

A complaint so "verified" is, of course, mere hearsay and cannot be given the force of evidence. It is not an affidavit and cannot have force as such.

> *Moore* v. *Thompson,* 138 Cal., 26;
> *Clark* v. *National Linseed Oil Co.,* 105 Fed., 790, 794.

The affidavit of appellant McLeod explicitly and unequivocally denies *in toto* the plaintiff's allegation in this regard (Tr. No. 2787, pp. 74-76).

With the opportunity thus presented for substantiating its charge by a showing in rebuttal, the Government has made no showing whatever.

It would, of course, be absurd if upon this state of the record, a court could give the allegations regarding dummy locations any weight or make the same a basis for appointing a Receiver.

Imagine a private individual presuming to come into court with a request for a receiver of lands long in the possession of another, upon the bald statement—flatly denied under oath—that he believes from what

others have told him, that there is a forged deed purporting to be from his grantor, in the occupant's chain of title!

IN CONCLUSION.

We believe that the Federal Courts have been serious in giving expression again and again to the idea that when the United States Government submits itself to the jurisdiction of one of its courts of equity, it does not thereby become a favored suitor, but is amenable to the same rules and principles that govern the humblest litigant.

If it be true—as judges have indicated—that for the preservation of the liberty of the citizen this principle must be jealously maintained by the courts, then it becomes fitting that we ask the Court what ought to have been done in the Court below had a private individual asked for a Receiver upon this same showing?

Here was appellant Oil Company in possession of the greater part of the two quarter sections of land in controversy.

It had expended $200,000.00 on the northeast quarter and had purchased it for more than $500,000.00 (Tr. 2787, p. 123).

On the northwest quarter it had laid out more than $150,000.00 (Tr. 2788, p. 116).

And its predecessor had expended upwards of $200,000.00 in such development.

There are ten producing wells on the property.

While this entire work of development was going on for a period of some five years the plaintiff stood by and raised no objection to the work. During all of that time appellant corporation and its predecessors have:

> "given to the agents of the Land Department free access to its books and records of all kinds, and the said United States Government has at all times during the said period had actual reports and knowledge of the improvements that the said corporation was making upon said property, and has had access to the books and papers of said corporation showing the amount of oil that it had extracted and was extracting, and showing the contractual obligations which said corporation was under in the matter of its equipment and the disposition of its oil supply;
>
> "That during all of the said time the plaintiff through the officers and agents of its Land Department has had actual knowledge that the defendant, Consolidated Mutual Oil Company, was in possession of the said property under a claim of right, and it has during all of said period of time and until the filing of this suit stood by and knowingly permitted the said defendant corporation, without objection, to make the aforesaid expenditures of money and to extract oils from said properties and to incur obligations in and about the development of said property, and to develop the said property to its present condition and to extract therefrom the very oil the value of which it is here seeking to recover" (Tr., No. 2788, pp. 116-17).

More than one year before this action was brought, the plaintiff permitted us to buy this land. Plaintiff took our money and issued to us a Final Certificate of Entry which declares that we are entitled to a patent (Tr., p. 81).

The plaintiff makes no attack upon this Final Certificate. It alleges no fraud in the proofs of diligence which we must have made upon the proceeding

in rem before the Receiver. Our Receiver's Certificate is a muniment of title generally considered conclusive in all collateral proceedings in the courts.

El Paso Brick Co. v. *McKnight,* 233 U. S., 257.

After having waited for years and watched us make this development and expend this vast sum of money, plaintiff suddenly rushes into a court of equity, and without any allegation or proof of insolvency upon the part of any defendant, demands upon what is at best a most debatable and doubtful showing of title, that a Receiver be instantly appointed.

Would not a Chancellor, if this were the case of a private individual seeking to throw a great business corporation into the hands of a Receiver, say to him that since he had waited so long he could well afford to wait a little longer until the cause should be heard and judgment rendered? We insist that the Court would be bound to do so upon general equitable principles; and in that connection we refer the Court to the words of one of its own judges in *United States* v. *Land Wagon Road Co.,* 54 Fed., 807, 811-12:

> "No good reason can be offered why the United States in dealing with their subjects, should be unaffected by considerations of morality and right which ordinarily bind the conscience. . . . When matter of estoppel arises, the observance of honest dealings may become of higher importance than the preservation of the public domain. It was well said in *Woodruff* v. *Trapuall,* 10 How., 190, that we naturally look to the actions of a sovereign state to be characterized by more scrupulous regard to justice and a

higher morality than belong to the ordinary transactions of individuals."

But if the general rules of morality are not enough to necessitate the refusal of such an application, then the settled doctrines of Chancery make it clear that no Receiver *pendente lite* should ever be appointed upon such a showing as is before the Court.

"The power of appointing Receivers is one which should be sparingly exercised and with great caution and circumspection, and only where the circumstances relied upon to warrant the appointment are made to appear by clear proof."

23 *Am. & Eng. Encyc.,* 1038.

The reluctance of courts in this particular is increased where the defendant's possession has been long continued.

23 *Am. & Eng. Encyc.,* 1039.

And we further submit that it is settled law that even for the very laudable purpose of restraining waste, the courts require a clear case and that it is only where the title and right to possession are clear and it is evident to the Court that the defendant is wrongfully in possession that a court of equity will assume jurisdiction and grant any relief for the purpose of restraining such waste *pendente lite.*

It cannot be the law that merely because a suitor says that he has title without making any showing under oath which *prima facie* bears out his assertion, a court of equity will grant him an injunction or ap-

point a receiver as of course. If so the rights of owners in possession are upon a footing less secure than has been heretofore supposed.

For the foregoing reasons appellants respectfully urge that the order appointing a Receiver was erroneous, and that it should be reversed.

Respectfully submitted.

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